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No._____

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD E. RICE,

Petitioner,

v.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTION PRESENTED

Whether the exception to the First Amendment prohibition against use of political affiliation in governmental employment decisions should apply to positions where political affiliation is concededly unnecessary for effective job performance.

LIST OF PARTIES

The parties to the proceedings before this Court are:

Petitioner:

EDWARD E. RICE, a public employee with the Ohio Department of Transportation, a state agency.

Respondents:

DAVID L. WEIR, Director of the Ohio Department of Transportation,[1] individually and in his official capacity.

PATRICK McCRAY, Deputy Director, Administrative Affairs of the Ohio Department of Transportation, individually and in his official capacity.

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[1] The Ohio Department of Transportation is not a party for purposes of this Petition or the appeal before the Sixth Circuit. The Agency was originally named a defendant pursuant to the Age Discrimination in Employment Act, 29 *United States Code* §615. Pursuant to a Rule 41(a) motion, Federal Rules of Civil Procedure, the age claim was voluntarily dismissed in the district court.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

EDWARD E. RICE,

Petitioner,

v.

OHIO DEPARTMENT OF
TRANSPORTATION, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Edward E. Rice, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on January 27, 1994.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth

Circuit is reported at 14 F.3d 1133 (CA 6 1994). The opinions of the Court of Appeals for the Sixth Circuit and the United States District Court for the Southern District of Ohio are reprinted as appendices A and B respectively.

JURISDICTION

This cause of action arose under 24 U.S.C. §1983. This case is making its second trip to this court; earlier this case was a companion case to Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990), and this court remanded this case back to the lower courts for disposition in light of the Rutan decision. 497 U.S. 1001 (1990).

The United States District Court for the Southern District of Ohio had jurisdiction under 28 United States Code §§1331, 1343. On August 5, 1992, the District Court, after trial on the merits, dismissed the plaintiff's cause of action holding that the petitioner failed to prove that he was denied a promotion because of his political belief and/or affiliation, but held that the position was not a confidential, policy making exception under the Branti/Elrod standard. The petitioner appealed to the United States Court of Appeals for the Sixth Circuit.

The Court of Appeals for the Sixth Circuit had jurisdiction of this cause under 28 United States Code §1291. On January 27, 1994, the Sixth Circuit affirmed the District Court's dismissal of the case. The Sixth Circuit did not squarely address the political discrimination issue on appeal,[1] but reached and decided the confidential and policy-making issue.

The Court has jurisdiction to review this case under 28 United States Code §1254.

CONSTITUTION PROVISIONS INVOLVED

First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech,

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[1]The Court did not address the qualified immunity issue either. The case was filed in district court on December 23, 1982. After remand from the Supreme Court in 1990, and approximately two weeks before the trial on the merits was scheduled, defendants filed a motion raising qualified immunity for the first time, almost nine years after the case was filed. The defendants did not plead the defense in their Answer. Appellant maintained vigorously at trial that the defense had been waived.

or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES INVOLVED

42 United States Code §1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen

of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

The petitioner, Edward E. Rice, has been employed by the Ohio Department of Transportation (ODOT) since May 1, 1969. He is presently a Personnel Officer III in the District 8 office of the Department located in Lebanon, Ohio. District 8 is composed of eight counties. Appellees Weir and McCray were officials of the Department; Weir was the director and McCray was deputy director of administrative affairs in the central office.

There are 12 districts within the state in the Ohio

Department of Transportation; each district is headed by a deputy district director, who reported directly to Appellee Weir. Appellant, a Republican, applied for a promotion in 1981 and 1982 to the position of administrative assistant, a position which reported directly to the deputy district director of District 8. Appellant had previously worked the administrative assistant position on a temporary basis several times in the past. His deputy district director recommended him for the promotion on both occasions.

The administrative assistant was essentially the chief personnel employee of the district and had an official job description which outlined his job duties *in the district.* (See District Court Opinion, Appendix B, pp. 9-13). The official duties were approved by the Department of Administrative Services, which was granted that authority by the state legislature. The state legislature also specifically made illegal hiring based upon political affiliation and political contributions into classified positions. Ohio Revised Code §124.60. The "unofficial duties" of the administrative assistant position included the illegal hiring and promotion of civil servants based upon the endorsement of the Republican Party County Chairman in the county when the vacancy

existed.[2]

In order to obtain employment/promotion to the administrative assistant position, the applicant/employee was required to obtain the approval of a *majority* of the Republican Party County Chairmen in the district of five of eight chairmen. When appellant did not receive the promotion to the administrative position in 1982, he met with Appellee McCray and asked why he was not promoted. McCray said to appellant, "For the administrative assistant position, you have to be a good contributor, and I'm saying a good contributor, a large amount . . ., for the administrative assistant position, and be a very active member in the Republican Party." McCray also confirmed that the endorse-

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[2] The Appellees adopted the policy approved by the Governor in 1979, which required the sponsorship and endorsement of the Republican Party County Chairman in the county where the vacancy existed for hiring and promotion decisions. In effect, the Republican Party Chairmen sponsorship and endorsement was required before any individual would be hired into a classified or unclassified position or promoted to any position. The Republican Party Chairmen's decision was based upon political affiliation and contributions to the Governor's campaign. The Department had a written hiring and promotion policy granting preference to Republicans who have voted and contributed to the Party.

ment by a majority of the county chairmen was required. (Tr. 233-34).

The promotions were filled by Andrew Siehl, a son of one of the Republican Party Chairman in District 8, and James Fife, a son of the Republican county auditor for one of the counties in District 8. It is not contested that the appellant was the most qualified person for the position of administrative assistant in terms of experience and qualifications, but because he did not have the political endorsement of a majority of the county chairman, he could not obtain the position.

Appellee Weir testified that the Republican Party County Chairmen made recommendations to Appellee McCray, his Deputy Director of Administrative Affairs, who presented to Weir the Chairmen's selection for approval for the administrative assistant position. (Tr. 171). This testimony contradicted earlier affidavits filed by Appellees Weir and McCray on April 11, 1984 in support of a motion for summary judgment. The affidavits denied that the political affiliation and support were requirements in 1981 and 1982 for the filling of the administrative assistant position. (Appendices C and D).

At trial, Appellee Weir testified upon cross-examina-

tion that the administrative assistant position need not be political[3] and the Sixth Circuit found that, ". . . it was possible for Weir to operate the Department without any politically vetted appointees at all."

The position description of the administrative assistant does not reference any "political or confidential duties" and the district court made ample findings to support this view. The position description sets forth the following duties:

> "Acts as special assistant to the *deputy district director* for the work areas of administration, budget and auditing, planning, right of way, and construction. Works with those staff members in coordinating policies and procedures. All work is performed under the *executive direction of the district deputy director.*"

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3 On August, 7 1992, Appellee Weir testified at trial that political affiliation for the position was not necessary. The question and answer were as follows:

Q. Did you consider the appointment of the Administra tive Assistant to be a political appointment?

A. It did not have to be. (Tr. 153).

"Acts as liaison with central office administrators in the district disseminating information on a variety of operational subjects pertaining to the administration, budget and auditing, planning, right of way, and construction areas. Answers both technical and non-technical questions arising from such information."

"Confers for the *deputy district director* with all staff members of those work units on matters involving policy determination in the administration thereof."

"Supervises and directs *district* program reports, reviewing such reports from an administrative and technical standpoint (exception is engineering data) and refers to the *district deputy director* with pertinent comments on adequacy and relevance of data and reports an internal relationship between units." (Pl. Ex. 18).

Brayshaw, the district deputy director, testified at trial that the administrative assistant position rarely, if

ever, met with the director, (Tr. 111); that the administrative assistant would not operate independently of the deputy district director, (Tr. 114); that the administrative assistant was to clear with the deputy district director before leaving the district, (Tr. 112); and according to Brayshaw, the administrative assistant would not be involved in making policy but only in implementing or following directives, (Tr. 123).

Weir testified that the administrative assistant was a confidential or personal employee, who "communicated" with him. The appellees at trial offered no exhibits which would document such a relationship, no specific meetings were discussed where such conversations took place, and no corroboration testimony was given at trial to support the assertions of Weir. Appellees' earlier affidavit testimony denied any political affiliation or loyalty requirements for the administrative assistant position. Furthermore, Appellee Weir could not identify by sight Siehl or Fife, did not know their background or experience, and could not specify one contribution they made in their position as an administrative assistant. (Tr. 284-287).

After trial the District Court rejected appellees' argument that the administrative assistant position sought by the

appellant fell within the confidential, policy making exception. The District Court analyzed the inherent duties of the position in question and found that the position was not inherently political and found that the job description simply provided duties that were administrative in nature and not confidential or policy making. The Court also mentioned that the position description for administrative assistant did not even mention Appellee Weir. (Appendix B, p. 12).

The district court found that Weir's testimony on the witness stand concerning the confidential and policy making duties of the administrative assistant was not credible. (Appendix B, p. 12).

The district court said:

> "Given Weir's earlier sworn statement on April 11, 1984, that he based his "decisions on hiring, firing and promotions upon job qualification, references and criteria which was not . . . in any way related to an applicant's . . . political activity or loyability [sic]. . . ," his present testimony on this issue is simply not credible."

REASONS FOR GRANTING THE WRIT

This Court Should Grant the Writ to Clarify an Important Question of Constitutional Law on Which Federal Appellate Courts Lack a Uniform Standard.

This Court has recognized that use of political association in governmental employment decisions threatens the First Amendment rights of applicants and employees in two ways: (1) by imposing an unconstitutional condition, and (2) by coercing political expression. Elrod v. Burns, 427 U.S. 347 (1976); Branti v. Finkel, 445 U.S. 507 (1980). That threat can be constitutionally justified only when the government has a sufficiently overriding purpose for use of political affiliation and that purpose cannot be served by politically neutral means, including monitoring of job performance and replacement of high level employees. Rutan v. Republican Party of Illinois, 497 U.S. 62 (1990).

A governmental interest in effective and efficient job performance has been recognized in positions that involve policymaking or access to confidential information because "party affiliation is an appropriate requirement for the effective performance of the public office involved." Rutan v.

Republican Party of Illinois, 497 U.S. at 64. Some lower federal courts have taken this language from Rutan and applied it literally to diminish the burden a governmental employer has under the precedent of demonstrating countervailing interests and necessary means. Other lower federal courts have treated the exception as a narrow one that compels the governmental employer to demonstrate that political affiliation or activity are necessary for effective job performance. See Selch v. Letts, 5 F.3d 1040 (CA 7 1993) (broad application of standard); Akers v. Caperton, 998 F.2d 220 (CA 4 1993); Burns v. County of Cambria Pa., 971 F.2d 1015 (CA 3 1992) (narrow application of standard); Stott v. Haworth, 916 F.2d 134, 143-144 (CA 4 1990), which string cites the cases which lead to " . . . seemingly inconsistent and unpredictable results" under the standard.

The question presented by this writ is whether a countervailing governmental interest should apply to positions where political affiliation is concededly unnecessary for effective job performance? Because Rutan used the term, "appropriate requirement," the court below concluded that a large exception existed to the First Amendment prohibition against use of political association in governmental employment decisions.

In liberally construing the Rutan language, the court below created a situation where the exception is quite likely to swallow the rule. The Sixth Circuit stated that:

> "Director Weir candidly acknowledged that his appointment of administrative assistant did not have to be political, and we dare say that it would have been possible for him to operate the department without any politically vetted appointees at all. But the test is not whether party affiliation and support are essential to the effective performance of the public office involved; the test under Branti is whether these are "appropriate" requirements. The outer limits of what is appropriate are now subject to determination by the courts, . . .". (Appendix A, p. 28).

When the burden on a governmental employer is simply to demonstrate that political association is appropriate, rather than necessary, for effective job performance, First Amendment protection is severely eroded, and there exists a gaping hole running right through the heart of the First Amendment in the public employment arena. Under the

Sixth Circuit's standard, practically any supervisory position, and perhaps some non-supervisory positions, within the department would not be afforded First Amendment protection. The Director could pick and choose at his whim employees whom he considers to be "politically appropriate".

Limiting First Amendment protection to the lower levels of government employment will both undermine Rutan's recognition that promotional decisions are also protected and reduce the protection to a relatively impotent level. After all, patronage is most often elicited for better paying rather than menial positions: the reward for "good" political association must be sufficient to attract others to modify their political association.

The potential for confusion that would lead to diverse rather than uniform standards was predicted. In Rutan v. Republican Party of Illinois, 497 U.S. 62, 111-112 (1990) (Scalia, J. dissenting), Justice Scalia, although criticizing the Rutan decision in his dissent, addressed the Elrod/Branti standard as follows:

> "Elrod allowed patronage dismissals of persons in "policymaking" or "confidential"

> positions. 427 U.S. at 367. Branti retreated from that formulation, asking instead 'whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.' 445 U.S., at 518. What that means is anybody's guess. The Courts of Appeals have devised various tests for determining when 'affiliation is an appropriate requirement.' See generally Martin, A Decade of Branti Decisions: A Government Officials' Guide to Patronage Dismissals, 39 Am. U.L. Rev. 11, 23-42 (1989). These interpretations of Branti are not only significantly at variance with each other; they are still so general that for most positions it is impossible to know whether party affiliation is a permissible requirement until a court renders its decision."

This court must clarify the standard so that the courts, public employers, and lawyers can reasonably predict and uniformly apply whether political affiliation is an unlawful requirement to the effective performance of the position in

question.

In Akers v. Caperton, 998 F.2d 220 (CA 4 1993), the Fourth Circuit Court of Appeals held, in a similar type of case, that a superintendent of the West Virginia Department of Highways, did have lower level policy making authority, but this did not outweigh his First Amendment rights prohibiting political affiliation. The fact that the superintendent may have been a "communicator" with the public was insufficient to afford an exception to the First Amendment prohibition.

In Selch v. Letts, 5 F.3d 1040 (CA 7 1993), however, a case involving patronage employment practices with the Indiana Department of Highways, a subdistrict superintendent was terminated based upon his political affiliation. The Seventh Circuit ruled in favor of the department because the Elrod/Branti standard gave discretion to federal judges to decide what is an exception to the First Amendment. The Seventh Circuit, acknowledged, however, that the status of the law under the standard has led to "conflicting results". 5 F.3d at 1047.

Stott v. Haworth, 916 F.2d 134 (CA 1990), also acknowledged "inconsistent and unpredictable results".

As it stands now, if an employee works for the West

Virginia Department of Highways in a position similar to the administrative assistant position in the Ohio Department of Transportation, he would be protected from political discrimination, but the Ohio employee and Indiana employee would not be so protected. Several federal circuit courts and some of the Justices on this court have acknowledged "unpredictable and conflicting results" throughout the country under the present standard. The appellant respectfully requests the court to grant the writ.

CONCLUSION

For these reasons, a writ of certiorari should be issued to the United States Court of Appeals for the Sixth Circuit to review the question presented by this Petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Andrew J. Ruzicho, a member of the bar of this court and counsel for petitioner herein, hereby certifies that three copies of the Petition For a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit have been served by certified mail, postage-paid, upon, counsel for respondents, David A. Kopech., 280 North High Street, Columbus, Ohio 43215 this 25 day of April, 1994.

ANDREW J. RUZICHO

Nos. 92-3855/4040

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EDWARD E. RICE,
Plaintiff-Appellant,
Cross-Appellee,

v.

OHIO DEPARTMENT OF TRANSPORTATION, et al.,
Defendants-Appellees,
Cross-Appellants.

ON APPEAL from the United States District Court for the Southern District of Ohio

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Decided and Filed January 27, 1994

Before: NELSON and BATCHELDER, *Circuit Judges;* and CONTIE, *Senior Circuit Judge.*

DAVID A. NELSON, *Circuit Judge.* This is a civil rights case that has been here before on its way to and from the Supreme Court. Plaintiff Rice, an employee of the Ohio Department of Transportation, claims that his rights under the First and Fourteenth Amendments were violated when

he was passed over for appointment to an administrative assistant's position. The position was filled, he says, through a political patronage system that benefited people who had closer ties than he to the Republican Party. This court affirmed a summary judgment in favor of the defendants, see *Rice v. Ohio Department of Transportation*, 887 F.2d 716 (6th Cir. 1989), but the Supreme Court vacated the judgment and remanded the case for reconsideration in light of the intervening decision in *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990).

After Mr. Rice's case was returned to the district court, further summary judgment proceedings led to dismissal of the damage claims against the Department on Eleventh Amendment grounds and against the individual defendants on qualified immunity grounds. The defendants were unsuccessful, however, in an attempt to obtain summary judgment in their favor on the question whether the administrative assistant' s position was a politically sensitive one that could lawfully be filled on a partisan political basis.

The plaintiff's claim for injunctive relief was subsequently tried to the court, sitting without a jury. The court denied relief on the ground that the plaintiff had not shown

that his failure to land the administrative assistant's job was the result of his failure to make financial contributions to the Republican Party and his failure to participate actively in the party's work. Final judgment having been entered in favor of the defendants, the plaintiff perfected a timely appeal.

The plaintiff contends on appeal that the individual defendants waived any qualified immunity defense and that the district court abused its discretion in permitting the belated assertion of such a defense. The plaintiff further contends that the district court erred in failing to find that the reason the plaintiff was not appointed to the administrative assistant's position was that he lacked Republican Party support for the position. The defendants, who took a protective cross-appeal, contend that the district court erred in failing to find that the position was a "political" one that could properly be treated as such in the appointment process.

Although the defendants may not have demonstrated that they were entitled to summary judgment on the latter issue, the record of the trial clearly establishes, we believe, that the nature of the particular job to which the plaintiff aspired was such that the job could be filled on a patronage

basis without compromising the constitutional rights of unsuccessful candidates. We shall affirm the judgment for the defendants on that ground, a disposition that obviates any need to reach the remaining issues.

I.

The plaintiff, Edward E. Rice, has been an officeholder and a Republican for many years. During the 1960s he served as a deputy sheriff in Butler County, Ohio. Toward the end of the decade he was an unendorsed — and unsuccessful — Republican candidate for sheriff. As far as the record discloses, he remains a registered Republican to this day.

In 1969 Mr. Rice obtained an administrative position in the Ohio Department of Transportation. The Butler County Republican Party chairman endorsed Mr. Rice for the job, and it was this endorsement, Mr. Rice testified, that resulted in his being hired. Rice began work as an administrative specialist at a Department of Transportation office in Middletown, Ohio, on May 1, 1969. His work station was soon moved to the new headquarters of the Department's District 8 in Lebanon, Ohio.

The Ohio Department of Transportation — a labor-intensive organization with as many as 9,000 employees — was divided into 12 geographical districts. District 8 covered Butler County and seven other counties in the Southwestern part of the state. During the early 1980s the department employed approximately 750 people in District 8.

There were only two high-level jobs in the district that were not part of the classified civil service: the job of district deputy director — a position required to be filled by a registered professional engineer, see Ohio Rev. Code §5501.14 — and the job of administrative assistant. Former District Deputy Director William W. Brayshaw, who testified at trial as a witness for plaintiff Rice, described the administrative assistant's job as "the top political position in ODOT . . . [at] the district level." The district deputy director and the administrative assistant both served at the pleasure of the director of transportation, and it was the director who appointed them. The director was a member of the governor's cabinet.

As a result of the 1974 gubernatorial election, in which James A. Rhodes, a Republican, was elected to succeed Democratic Governor John Gilligan, a vacancy occurred

in the District 8 administrative assistant's position. Mr. Rice became a candidate for appointment to the job. The process one had to go through, he testified, entailed seeking endorsement from the Republican county chairmen for the eight counties in the district. Mr. Rice went through that process, contacting each county chairman and requesting his endorsement. A majority of the chairmen, however, endorsed a man named McKee Cornett. "[T]herefore," Mr. Rice testified, "[Mr. Cornett] was appointed to be Administrative Assistant."

Mr. Cornett subsequently offered Mr. Rice an unclassified position in the District 8 personnel office, and Rice accepted the offer. He returned to a classified position in November of 1975, and he has been a personnel officer in the classified civil service since January of 1976. In that capacity Mr. Rice sometimes functioned as administrative assistant when Mr. Cornett was on vacation or ill.

Mr. Cornett retired in December of 1981, at which time Mr. Rice contacted defendant Patrick McCray, then the department's deputy director for administrative affairs, and expressed an interest in being named as Mr. Cornett's successor. "Well," Mr. Rice quoted Mr. McCray as responding,

"you know what you have to do." Mr. Rice then went around to the county chairmen and again asked for their endorsement for the administrative assistant's job.

Five of the eight county chairmen, as Mr. Rice subsequently learned from District Deputy Director Brayshaw, endorsed a rival candidate, Andrew Siehl, who was the son of the Preble County Republican chairman. The Director of Transportation, defendant David L. Weir, appointed Andrew Siehl against the advice of Brayshaw, who favored plaintiff Rice for the job.

In August of 1982 Andrew Siehl took a leave of absence to work on Congressman Clarence Brown's campaign for governor. Mr. Rice let Deputy Director McCray know of his interest in being appointed administrative assistant on a temporary basis, but James Fife, who had been a subordinate to Mr. Rice, was named acting administrative assistant instead. Mr. Fife, the son of the Clinton County Auditor, had the support of a majority of the eight county chairmen.

After the selection of Mr. Fife was announced, Mr. Rice met with Deputy Director McCray in Columbus to find out why he (Rice) had not been given the appointment. Mr. McCray told him, as Mr. Rice subsequently testified, that

"[y]ou have to be endorsed by the county chairmen." In addition, Rice quoted McCray as saying, "you have to be a good contributor for the position of Administrative Assistant, and be a very active member in the Republican party."

In December of 1982 Mr. Rice brought a federal civil rights action against the Department of Transportation, Director of Transportation Weir, and Deputy Director McCray. The case was eventually dismissed on a motion for summary judgment, the district court holding, among other things, that although the First and Fourteenth Amendments protect many public employees from being discharged on partisan political grounds, the Constitution does not prohibit hiring decisions from being made on such grounds. This court affirmed the dismissal, in the decision reported at 887 F.2d 716, relying on *Messer v. Curci*, 881 F.2d 219 (6th Cir. 1989) (en banc).

The principle that was applied in *Messer v. Curci* did not survive *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990), where the Supreme Court held that the Constitution largely rules out reliance on party affiliation and support as a basis for hiring low-level public employees. In the wake of *Rutan* the Supreme Court vacated our *Rice* decision on a petition

for certiorari,[1] and the case was remanded to us for reconsideration. We in turn vacated the judgment of the district court and remanded the case for further proceedings in that court.

After disposing of a new round of summary judgment motions, as noted above, the district court conducted a bench trial on Mr. Rice's claim for injunctive relief. Two issues were presented for decision, as the district court saw it:

> "(1) whether the position of administrative assistant for District 8 of ODOT is one for which political considerations are an appropriate requirement; and
>
> (2) if not, whether plaintiff established by a preponderance of the evidence that he was denied the promotion because he did not contribute money to or otherwise actively support the Republican party."

(Memorandum and order of August 4, 1992, at p. 5.) Some of the evidence bearing on these issues has already been alluded to, but the evidence relating to the first issue

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[1] *Messer v. Curci* was vacated as well. 497 U.S. 1001 (1990).

merits a somewhat closer look.

David L. Weir, who was director of transportation from January of 1977 to January of 1983, testified on cross-examination that only about 35 of the 9,000 positions of the department were outside the classified civil service. Five deputy directors at the department's central office in Columbus had unclassified positions, as did the district deputy director and the administrative assistant in each of the 12 districts. Although the administrative assistant reported to the district deputy director, the latter did not have the final say on the selection of the administrative assistant; the appointment power was vested in the director of transportation personally, and the director could — and in the case of Mr. Rice did — reject advice from the district deputy director on whom to appoint.

The written job description for the administrative assistant position in District 8, as approved by District Deputy Director Brayshaw in April of 1981, identified the administrative assistant's work as covering five broad areas: "Administration, Budgeting & Auditing, Planning, Right-of-Way, and Construction." The administrative assistant coordinated policies and procedures in these areas, according to

the job description; acted as liaison with central office administrators on subjects pertaining thereto; acted as liaison with the district on such matters; conferred with staff members on policy determinations and the administration thereof; supervised and directed preparation of district program reports; and provided the district deputy director with comments on the adequacy and relevance of data in the reports and on internal relationships between units of the division.

The written job description did not refer to political duties e*o nomine*, but District Deputy Director Brayshaw — the witness who characterized the job as "the top political position" in the district — testified that the job carried overtly political duties as well. The administrative assistant, Mr. Brayshaw said, was the pipeline for input from the Republican Party chairmen in the eight-county district. Recommendations on hiring matters were made by the county chairmen through the administrative assistant, according to Brayshaw. Mr. Rice confirmed that vacancies in jobs such as project inspector in the construction department and highway worker in the maintenance department were filled, provisionally, on referral to the administrative assis-

tant by the county chairmen. (The Supreme Court's *Rutan* decision teaches that selection for low-level jobs such as these may not constitutionally be conditioned on support by a political party; in 1982, however, when James Fife was picked to be acting administrative assistant, *Rutan* was still eight years in the future.)

Although Mr. Brayshaw said that neither he nor the administrative assistant was responsible for establishing departmental policy, each had a role in making policy recommendations in the areas for which he was responsible. The administrative assistant was expected to confer with the top staff in the district and recommend changes in policies promulgated by the central office in Columbus where changes seemed to be called for. It did not take any particular political affiliation to make such recommendations, Mr. Brayshaw acknowledged, but Director Weir explained that it was through the administrative assistant that the Department found out what the problems were at the local level. Because the administrative assistants worked with the county chairmen, local public officials, state legislators, and the general public in their respective districts, Weir testified, it was one of the functions of the administrative assistant to

report public feeling on "[highway] projects, problems, whatever the Department was doing." Director Weir added that District 8 had the largest number of active highway projects within the Department.

In 1977 the Department of Transportation administered over 1,000 local government projects across the state for which federal funding was received. In addition, the Department had over 1,000 state highway projects that needed to be prioritized. The projects were reviewed to determine which ones were important to the local communities and regions, with political input and technical input coming from the district deputy directors and the administrative assistants as well as from some of the central office deputy directors. There was a period of declining revenues for some years prior to 1981, but the state gasoline tax was increased that year for the first time in decades. With increased tax revenues, as Director Weir put it, "[e]verybody wanted a piece of the money and there still was not enough money to do all of the jobs." The task of working out appropriate priorities had a political dimension, obviously, and the record shows without contradiction that the administrative assistants provided political input in this sensitive area.

Although Director Weir testified that he regarded the administrative assistant's position as one requiring personal and political loyalty, he had executed an affidavit in 1984 in which he denied that he based his appointments to the job on political loyalty. Stressing what it viewed as a discrepancy in this regard, noting that the administrative assistant was under the direct supervision of the district deputy director rather than the director of transportation, and noting further that the administrative assistant performed most of his duties at the district level and would spend less than one percent of his time meeting with the director of transportation personally, the district court concluded that political affiliation or support had not been shown to be an appropriate requirement for effective performance of the administrative assistant's office. "Even Weir acknowledged that appointment to the position did not have to be political," the court observed. And although the court did not comment on this fact, the plaintiff points out that Weir testified he could not identify either Siehl or Fife by sight.

With respect to the second issue presented for decision, the district court found that neither Mr. Rice's failure to contribute money to the Republican Party nor his lack of

active participation in Republican affairs played a substantial or motivating role in Director Weir's decision not to appoint him to the administrative assistant's position. Both Siehl and Fife may have been better situated to secure the endorsement of the Republican county chairmen, the court continued, because of the positions the candidates' fathers occupied in the Republican Party. The district court made no explicit finding as to whether endorsement by the county chairmen was a prerequisite for selection as administrative assistant. If nepotism is not unconstitutional, the court may have considered the endorsement question irrelevant; the court may have had difficulty seeing, in other words, how a selection based on nepotism could interfere with the associational and free speech rights of the unsuccessful candidate.

The district court entered final judgment for the defendants on August 5, 1992. The plaintiff filed his notice of appeal on August 11, and the defendants filed their protective cross-appeal on September 2, 1992.

II.

Since the age of Jackson, if not before, America has been somewhat ambivalent about the political spoils system

— a system which, like most human institutions, has its pluses and its minuses.[2] Serious legislative efforts to rein in the spoils system at the federal level began well over a century ago, with strong support from President Hayes. The principle that most inferior federal officers should be hired on a merit basis and should not be subject to dismissal on the basis of partisan political considerations is a principle that came to be widely accepted, if not universally approved, in the decades following passage of the Civil Service Act (22 Stat. 404) in 1883.

For the first 200 years after the Declaration of Independence, however, there would doubtless have been general agreement with the thought expressed by Chief Justice Taft in *Myers v. United States*, 272 U.S. 52, 174 (1926): "The extension of the merit system," Taft wrote, "rests with Congress." Extension of the merit system at the state level, similarly, was generally thought to rest with the state legislatures.

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[2] Some of the pluses are described in Justice Powell's vigorous dissents in *Elrod v. Burns*, 427 U.S. 347, 376 (1976), and *Branti v. Finkel*, 445 U.S. 507, 521 (1980); some of the minuses are described in Justice Brennan's plurality opinion in the former case.

State legislatures did not always embrace the concept of civil service reform with enthusiasm, it is fair to say, but the United States Supreme Court came to do so. The landmark case is *Elrod v. Burns*, 427 U.S. 347 (1976), where the question presented was whether non-civil-service employees of the Cook County, Illinois, sheriff's department — employees who included a process server, a court bailiff and security guard, and the chief deputy of the process division — could be discharged by a newly elected Democratic sheriff solely because they were appointees of the new sheriff's Republican predecessor and lacked the support of the Democratic party. Five members of the Court agreed that such discharges would be unconstitutional.

Justice Brennan, who announced the judgment of the Court and delivered what Justice Stewart (who concurred in the judgment)[3] called a "wide-ranging" plurality opinion, decried "[t]he inefficiency resulting from the wholesale replacement of large numbers of public employees every time political office changes hands . . . ." *Id.* at 364. Given this inefficiency, Justice Brennan was not persuaded that pervasive patronage firings could be justified as promoting

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3 427 U.S. at 374.

effective, responsive, and accountable government. While recognizing a danger that representative government might be undercut by holdover appointees obstructing the implementation of a new administration's policies, Justice Brennan wrote that this consideration was "inadequate to validate patronage wholesale." *Id.* at 367. "Limiting patronage dismissals to *policymaking* decisions is sufficient to achieve this governmental end," he said. *Id.* (Emphasis supplied.) Subject to a "policymaking position" exception, Justice Brennan concluded, the practice of patronage dismissals is unconstitutional under the First and Fourteenth Amendments because it encourages officeholders to compromise their true beliefs and interferes with their freedom to associate with the political party of their choice.

The scope of the exception was not clearly delineated in Justice Brennan's opinion, but several considerations were identified as relevant in determining whether a particular job would come within the exception:

> "No clear line can be drawn between policymaking and nonpolicymaking positions. While nonpolicymaking individuals usually have limited responsibility, that is not to say that

one with a number of responsibilities is necessarily in a policymaking position. The nature of the responsibilities is critical. Employee supervisors, for example, may have many responsibilities, but those responsibilities may have only limited and well-defined objectives. An employee with responsibilities that are not well-defined or are of broad scope more likely functions in a policymaking position. In determining whether an employee occupies a policymaking position, consideration should also be given to whether the employee acts as an adviser or formulates plans for the implementation of broad goals." 427 U.S. at 367-68.

In *Branti v. Finkel*, 445 U.S. 507 (1980), where Justice Stevens wrote an opinion in which all but three members of the Court joined,[4] the Court made it clear that the holding of *Elrod* was broad enough to reach "a simple requirement that an employee be sponsored by the party in power;" the *Elrod* holding was not limited to "situations in which government

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[4] Justice Brennan concurred in the majority opinion; Justice Stewart dissented.

employees are coerced into pledging allegiance to a political party that they would not voluntarily support . . . ." *Id.* at 512. Accordingly, the Court held in *Branti*, assistant county public defenders who had been appointed by a Republican chief public defender could not be discharged by the latter's Democratic successor solely because they did not have Democratic sponsorship.

Justice Stevens' opinion recognized, as had the opinions of Justices Brennan and Stewart in *Elrod*, that "party affiliation may be an acceptable requirement for some types of government employment." *Branti*, 445 U.S. at 517. Noting that Justice Stewart's opinion in *Elrod* had suggested that such a requirement would not be acceptable for "nonpolicymaking, nonconfidential," government employees, Justice Stevens observed that circumstances could exist in which "a position may be appropriately considered political even though it is neither confidential nor policymaking in character." *Id.* at 518. On the other hand, he continued, "party affiliation is not necessarily relevant to every policymaking or confidential position." *Id.* Thus a political test would not be appropriate for a state university football coach, even though he "formulates policy" in a sense, but

such a test would be appropriate for a nonpolicymaking gubernatorial assistant hired to write speeches, deal with the press, or communicate with the legislature. *Id.*

The extent to which a particular job has a policymaking dimension is still relevant, we believe,[5] but the "ultimate inquiry," *Branti* teaches, "is whether the hiring authority can demonstrate that party affiliation [or sponsorship] is an appropriate requirement for the effective performance of the public office involved." *Id.* This test could not be met in the case of an assistant public defender, *Branti*

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[5] In *Garretto v. Cooperman*, 510 F.Supp. 816, 819 (S.D.N.Y. 1981), aff'd without published opinion, 794 F.2d 676 (2d Cir. 1984), Judge Leval wrote that [i]f *Branti* is to be read literally . . . the policymaking responsibilities of the job are of no consequence." Judge Leval found it hard to believe that the Supreme Court really meant this, and we do not read Justice Stevens' opinion as saying what Judge Leval thought it said. Other courts have concluded that the presence of policymaking responsibilities continues to be relevant. See, *e.g.*, *Ray v. City of Leeds*, 837 F.2d 1542 (11th Cir. 1988), where the court seemed to give controlling significance to the fact that the position in question involved policymaking. See also *Selch v. Letts*, 5 F.3d 1040, 1043 (7th Cir. 1993), where the *Branti* Court was said to have abandoned the "exclusive" use of the terms "policymaking" and "confidential" to describe the types of jobs for which political tests are not forbidden by the Constitution.

continued, because "[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State." *Id.* at 519. For such an official to be subject to discharge for lack of allegiance to the dominant political party, the *Branti* Court concluded, "would undermine, rather than promote, the effective performance of [his] office . . . ." *Id.* at 519-520.

Elrod and *Branti* — both of which involve the dismissal of employees who had already been hired for the positions in question — represent the Supreme Court's last word on the extent to which political party affiliation and sponsorship are appropriate requirements for public employment. In *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990), where the Court held that promotion, transfer, recall, and hiring decisions involving certain low-level state employees could not be based on political party tests, it was conceded that none of the positions to which the plaintiffs aspired came within the exception recognized in *Elrod* and *Branti*.[6] Accordingly, the *Rutan* Court said, "[t]he scope of

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[6] The plaintiffs in *Rutan* were a rehabilitation counselor and a road equipment operator who sought promotions, an applicant for a job as a prison guard, and a garage worker and a dietitian who had been laid off and wanted to be recalled. 497 U.S. at 67.

[the] exception does not concern us here . . . ." *Id.* at 71, n. 5.

Our court had occasion to elaborate on the scope of the *Elrod/Branti* exception in *Faughender v. City of North Olmsted, Ohio*, 927 F.2d 909 (6th Cir. 1991). The *Faughender* case involved termination of the employment of a suburban mayor' s secretary after the incumbent mayor, a Democrat, failed to win renomination and was replaced by a Republican. Relying in part on *Williams v. City of River Rouge*, 909 F.2d 151 (6th Cir. 1990), we indicated that it was necessary to examine the duties and any political requirements of the secretary's position both in the abstract and through the eyes of the new mayor. If the duties of a mayor's secretary are inherently political, we said, a political test may be applied. Such a test could also be applied, we said, if the duties of the secretarial position as *envisioned by the new mayor* were inherently political — at least if the new mayor entertained a good faith belief that having a secretary who could perform such duties would be necessary to implement the policies of the new administration. *Faughender*, 927 F.2d at 913-14.

Analyzing the duties of the mayor's secretary both in the abstract and as envisioned by the new mayor, *Faughender* concluded that the secretary's position was inherently politi-

cal under either analysis. This was so regardless of whether the plaintiff had in fact performed political or policy-oriented tasks as secretary to the former mayor. The "inherent" duties of a mayor's secretary — and the duties that the new mayor reasonably expected her secretary to perform — had a significant relationship to "the flow of information, whether by writing, speech, or personal visit, to and from the mayor's office . . . ." *Id.* at 913. And "[a]s political action cannot occur without communication, a position that controls the lines of communication of a political actor must be inherently political." *Id.* at 914.[7]

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[7] *Faughender* is consistent, we believe, with a number of appellate court decisions that have treated the *Elrod/Branti* exception as a fairly broad one. Of these cases, the one that is probably closest to the case at bar on its facts is *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993), where the job of an Indiana highway subdistrict superintendent was held to come within the exception. Also helpful is *Jimenez Fuentes v. Torres Gaztambide*, 807 F.2d 236 (Ist Cir. 1986) (en banc), *cert. denied*, 481 U.S. 1014 (1987), where a regional directorship in an urban development and housing agency was held to come within the exception because the position "involve[d] government decisionmaking on issues where there [was] room for political disagreement on goals or their implementation" and because the responsibilities of the job were such that the person holding it "resembles a policymaker, a privy to confidential information, a communicator, or some other office holder whose function is such that party affiliation is an equally appropriate requirement." *Id.* at 241-42. Other cases are collected in Martin, *A Decade of Branti Decisions: Government Official 's Guide to Patronage Dismissals*, 39 Am. U. L. Rev. 11 (1989).

III.

Applying the lessons of *Faughender* and its antecedents here, it is clear, we believe, that Ohio's director of transportation is a "political actor." Responsible for overseeing the expenditure of enormous amounts of money taken from the citizens of the state by taxation, the director, like the governor who appointed him, obviously wants to see the money spent in ways that will maximize voter satisfaction and minimize voter dissatisfaction. And there is ample room for political disagreement on how the available resources should be allocated: should the road I take to work be upgraded, for example, at the cost of deferring similar work on some other road?

If the director and his central office staff are to do their jobs properly, they need lines of communication with the public and with political leaders who are in touch with the public. To a significant extent, the record of this case shows without contradiction, those lines of communication run through the 24 district deputy directors and administrative assistants located in department of transportation districts throughout the state.

It is true that most of the work of an administrative

assistant is done at the district level and that much of his work is simply administrative in nature. But all politics is local, as the saying goes, and the paper-shuffling functions of the transportation department's top political people in the field did not make their jobs any more "unpolitical" than did the routine typing and filing performed by the secretary of the mayor in the *Faughender* case. District 8 covered a substantial geographical area, moreover, and each of the 12 districts in the Ohio transportation system would doubtless have been larger than the highway subdistrict involved in *Selch v. Letts*, 5 F.3d 1040 (7th Cir. 1993). The superintendency of the *Selch* subdistrict was held to be exempt from First Amendment protection notwithstanding that the Indiana Department of Highways had a total of 36 subdistricts, each with its own politically appointed superintendent.

It is also true that the Ohio director of transportation did not himself work closely with each of the administrative assistants in the field. How could he be expected to, given the size of his operation? Administrative Assistant McKee Cornett, Mr. Rice's sometime boss in Lebanon, Ohio, may not have been a regular visitor to the inner sanctum of Director Weir at the state capitol, but it is safe to assume that Mr.

Cornett could pick up the telephone and talk to Patrick McCray, the deputy director for administrative affairs, just as Mr. Rice himself did on occasion.[8] Nothing in the controlling case law suggests that exceptions to the merit-based principles that were constitutionalized in *Elrod*, *Branti*, and *Rutan* must be limited to a small circle of people who report directly to the department head. Given the size of modern state governments, such a limitation would be unrealistic.

We do not mean to suggest that Ohio's director of transportation would be free to make patronage appointments "wholesale," to use the term repeatedly employed by Justice Brennan in *Elrod*, even if Ohio law permitted it. In a department of 9,000 persons, however, it is hardly unreasonable to suppose that a few dozen positions could properly be classified as politically sensitive.

No particular mix of political and nonpolitical slots is

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[8] Although Director Weir could not recognize Administrative Assistant Siehl and Acting Administrative Assistant Fife by sight, the district court does not seem to have considered this significant. Neither do we. Even the President of the United States may not always be able to recognize members of his cabinet, but no one would argue that the position of a cabinet officer is not inherently political.

inevitable, of course. Director Weir candidly acknowledged that his appointment of administrative assistants did not have to be political, and we daresay that it would have been possible for him to operate the department without any politically vetted appointees at all. But the test is not whether party affiliation and support are *essential* to the effective performance of the public office involved; the test, under *Branti*, is whether these are "appropriate" requirements. The outer limits of what is appropriate are now subject to determination by the courts,[9] but within those limits, surely, the judgment of the people's elected representatives merits respect. This is the lesson of *Faughender*, where

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[9] Justice Powell criticized the *Branti* standard as "certain to create vast uncertainty," *Branti*, 445 U.S. at 524 (Powell, J., dissenting), and Justice Scalia suggested that "[w]hat [it] means is anybody's guess." *Rutan*, 497 U.S. at 111 (Scalia, J., dissenting). At a minimum, however, we take it that courts are entitled to look at the factors mentioned by Justice Brennan in *Elrod*: the scope of the employee's responsibilities, the clarity with which those responsibilities are defined, and "whether the employee acts as an adviser or formulates plans for the implementation of broad goals." *Elrod*, 427 U.S. at 368. All of these factors militate in favor of the conclusion that the administrative assistant's job sought by Mr. Rice was a policymaking one. Administration, budgeting and auditing, planning, right-of-way, and construction — the five areas named in the job description — cover a very broad waterfront, and the responsibilities of the administrative assistant in

we held that the mayor was entitled to decide for herself whether to give her secretary political responsibilities that would justify appointment on a political basis.

It may be instructive, in this connection, to consider the change that occurred 25 years ago in the operation of the United States Postal Service. Prior to 1969 it had long been the practice to apply partisan political tests in the appoint-

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these areas were by no means well defined. The latter circumstance makes it "more likely" that the administrative assistant "function[ed] in a policymaking position." *Elrod, Id.* So too does the fact that the administrative assistant was responsible for conferring with a broad range of staff members "on matters involving policy determination. . . ." Whether the "policymaking" label fits here is not the ultimate inquiry, to be sure, but the answer to that question clearly has a bearing on the appropriateness of allowing political tests to be applied in filling the job. Other significant questions are whether the administrative assistant functioned as a "communicator" on subjects not purely technical in nature, see *Faughender*, 927 F.2d at 914, whether he had "meaningful input into government decisionmaking on issues where there is room for principled disagreement on the goals or their implementations," *Nekolny v. Painter*, 653 F.2d 1164, 1170 (7th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982), and, more precisely, whether he had meaningful input into decisions on "where and when, within his [district,] work was to be done." *Selch*, 5 F.3d at 1045.

ment of postmasters. There were those who doubted that such a practice was essential to the effective operation of the postal system, and President Nixon, in the first message he sent to Congress after taking office, recommended legislation designed to take politics out of the appointment of postmasters. Congress ultimately accepted the President's recommendation, and a legislatively mandated Postal Service merit system has been in place ever since. Some may consider this merit system's merits debatable as a matter of policy. As a matter of law, however, if Chief Justice Taft was correct in *Myers*, the decision to extend the merit system to the appointment of postmasters was one properly left to the people's elected representatives. Even after *Elrod* and *Branti*, the legislature's decision as to whether a particular job should be classified as political or nonpolitical is at least entitled, as the First Circuit has said, to "some deference." *Jimenez Fuentes*, 807 F.2d at 246.

The functions that local administrative assistants performed in the Ohio Department of Transportation under Governor Rhodes bore more than a passing resemblance to the functions that local postmasters performed under President Lyndon Johnson and virtually all of the latter's prede-

cessors. Both types of job had a political dimension, and it was not inappropriate — and thus not illegal — to apply political tests in selecting the relatively small number of people needed to perform such jobs.

For the reasons stated, the final judgment entered by the district court in favor of the defendants in this case is **AFFIRMED.**

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD E. RICE,	:	
Plaintiff,	:	**JUDGMENT IN A CIVIL CASE**
vs.	:	**Case C-2-82-1700**
OHIO DEPARTMENT OF TRANSPORTATION ET AL.,	:	**Judge Holschuh** **Magistrate Judge Abel**
Defendants.	:	

[ ] **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been renderd.

IT IS ORDERED AND ADJUDGED that pursuant to the Memorandum and Order entered August 4, 1992, JUDGMENT is entered in favor of Defendants Ohio Department of Transportation, David L. Weir, Patrick McCray and Jerry Wray.

Date: **August 5, 1992** **Kenneth J. Murphy, Clerk**

(signed) _____

By Peg Lambert/Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

EDWARD E. RICE,	:	
Plaintiff,	:	**Case C-2-82-1700**
vs.	:	
OHIO DEPARTMENT OF TRANSPORTATION ET AL.,	:	
Defendants.	:	

MEMORANDUM AND ORDER

This matter was tried to the Court without a jury on August 6 and 7, 1991. The parties submitted post-trial briefs and proposed findings of fact and conclusions of law. In addition to arguing the merits of the case, the parties also addressed in their post-trial briefs certain evidentiary matters, including the admission of plaintiff's exhibits five through ten and the deposition of Wendell Strong, which the Court previously reserved ruling on.

Plaintiff Edward E. Rice commenced this action on December 23, 1982, alleging various claims of discrimination by defendants in failing to promote him to the position of administrative assistant within District 8 of the Ohio Depart-

ment of Transportation. The case has a lengthy procedural history, having gone to the United States Supreme Court and back. This procedural history was set forth in the Court's July 10, 1991 memorandum and order on defendants' motion to dismiss, and will not be repeated here. Suffice to say that by the time of trial, plaintiff's sole remaining claim, brought pursuant to the First and Fourteenth Amendments and 42 U.S.C. § 1983, was that defendants David L.Weir and Patrick McCray unlawfully denied plaintiff's promotion to administrative assistant because of his failure to contribute money to or otherwise actively support the Republican Party.

The Court previously dismissed defendant Ohio Department of Transportation ("ODOT") from this action on Eleventh Amendment grounds and determined that Weir and McCray were entitled to qualified immunity. Accordingly, plaintiff's remedy, should he prevail on the merits, was limited to prospective injunctive relief. Because David L. Weir was no longer Director of ODOT by the time of trial, Jerry Wray, the current director, was substituted as a party defendant for the purpose of the prospective injunctive relief.

The following constitutes the Court's findings of fact

and conclusions of law pursuant to Fed. R. Civ. P. 52(a).

BACKGROUND

Plaintiff has been employed by ODOT since May 1, 1969. He obtained this employment by receiving the endorsement of the chairman of the Butler County Republican Party. Plaintiff served as an administrative specialist 3, a classified position, from his date of hire until May 30, 1975.

The administrative assistant post for District 8 became vacant in early 1975, and plaintiff applied for the position. He requested the endorsement of the Republican Party chairmen for the eight counties making up District 8, but a majority of the chairmen favored McKee Cornett. Cornett was subsequently appointed to the position. Following his appointment, Cornett promoted plaintiff to the position of executive 4, an unclassified position. As executive 4, plaintiff assisted Cornett in the performance of his duties and was the acting administrative assistant in Cornett's absence.

On November 23, 1975, plaintiff returned to the administrative specialist 3 position. Later, he was reclassified and appealed his classification to the State Personnel Board of Review. The Board reclassified him as a personnel officer

2 effective January 4, 1976. On June 4, 1978, plaintiff was promoted to personnel officer 3 and has remained in that classification to the present. All of plaintiff's positions under ODOT have been within District 8.

McKee Cornett became ill in 1981 and was placed on extended sick leave. In Cornett's absence, William Brayshaw, the district deputy director, asked plaintiff to assume Cornett's duties as administrative assistant. When it became apparent that Cornett would not be returning anytime soon, Brayshaw instructed plaintiff to prepare a personnel action placing plaintiff into the administrative assistant position at a temporary work level. The temporary work level would enable plaintiff to receive the same salary as an administrative assistant. On August 24, 1981, Brayshaw sent a memo to his staff informing them that plaintiff would become the acting administrative assistant. Brayshaw signed the personnel action the next day. Defendants Weir, the Director of ODOT, and McCray, the deputy director, refused to approve the temporary work level and ordered Brayshaw to rescind his August 24 memo. Brayshaw told plaintiff that the reason given for not approving the temporary work level was that ODOT could not place a classified employee into an unclassified position.

Brayshaw then temporarily assumed the duties of administrative assistant in addition to his own.

Cornett retired effective December 1, 1981. Upon learning of Cornett's retirement, plaintiff again solicited the endorsement of the eight Republican county chairmen. Plaintiff was unsuccessful, and a majority of the chairmen endorsed Andrew Siehl. Siehl was the son of the Preble County Republican chairman. Weir appointed Siehl to the position on November 7, 1981.

Siehl was granted a leave of absence from August 15, 1982 to November 21, 1982 to work on the Republican gubernatorial campaign. Plaintiff contacted McCray to request that he be considered for the administrative assistant position on a temporary basis. The Republican county chairmen again met and endorsed Jim Fife as Siehl's replacement. Fife was the son of the Clinton County auditor. Fife was appointed acting administrative assistant for District 8 by way of a temporary work level. Prior to his appointment, Fife had served in a classified position under plaintiff.

ISSUES

There are two issues presented to the Court for decision: (1) whether the position of administrative assistant for

District 8 of ODOT is one for which political considerations are an appropriate requirement; and (2) if not, whether plaintiff established by a preponderance of the evidence that he was denied the promotion because he did not contribute money to or otherwise actively support the Republican Party.

The Court earlier denied defendants' motion for summary judgment on the first issue, stating that "even if the evidentiary materials submitted by defendant do, in fact lend some support to their claim, these materials do not conclusively demonstrate that political loyalty, whether partisan or personal, is an appropriate requirement for the effective performance of the job of administrative assistant." Defendants again moved for judgment as a matter of law on this issue at the close of plaintiff's case-in-chief, and the Court on this occasion declined to rule on the matter until the close of all the evidence.

DISCUSSION

I.

The confidential, policymaking exception to the First Amendment's prohibition against adverse public employment decisions on the basis of political beliefs was first

formulated in Elrod v. Burns, 427 U.S. 347, 367-68 (1976). The Supreme Court later refined this exception stating that "the ultimate inquiry is not whether the label 'policymaker' or 'confidential' fits a particular person; rather, the question is whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved " Branti v. Finkel, 445 U.S. 507, 518 (1980).

The Sixth Circuit has explained that when determining whether political loyalty is an appropriate job requirement, a court must analyze the inherent duties of the position in question, not the work actually performed by previous holders of that position. Faughender v. City of North Olmsted, 927 F.2d 909, 913 (6th Cir. 1991) (citations omitted). The appeals court proposed a two-part test to examine (1) the inherent duties of the position in question and (2) the actual duties that the new holder will perform. Id. A plaintiff's failure to meet either part of the test will result in dismissal of his claim. Id.

The position of administrative assistant for District 8 of ODOT is an unclassified position under the civil service laws of the State of Ohio. A person holding that office, thus, serves at the pleasure of the director. On both occasions in

1981 when plaintiff applied for the position, David L. Weir was Director of ODOT.

The job description for the position of administrative assistant at all relevant times listed the following four areas of responsibility:

1. Acts as special assistant to the District Deputy Director for the work areas of administration, budget and auditing, planning, right-of-way, and construction. Works with those staff members in coordinating policies and procedures. All work is performed under the executive direction of the District Deputy Director;

2. Acts as liaison with central office administrators and the District disseminating information on a variety of operational subjects pertaining to the administration, budget and auditing, planning, right-of-way, and construction areas. Answers both technical and nontechnical questions arising from such information;

3. Confers, for the District Deputy Director, with all staff members of these work units on matters involving policy determinations and the administration thereof; and

4. Supervises and directs district program reports reviewing such reports from an

> administrative and technical standpoint and refers to the District Deputy Director with pertinent comments on adequacy and relevance of data in reports and internal relationship between units.

According to the job description, each of these areas was to be apportioned equally in the performance of the administrative assistant's duties and such duties were to be performed under the direction of the deputy district director.

Defendants contend that the descriptive language, together with the interpretative testimony offered by Weir and former district deputy director William Brayshaw, establish the confidential, policymaking nature of the administrative assistant position. They point to the fact that a person holding that position acts as a liaison with ODOT's central office administrators and coordinates policies and procedures. Defendants emphasize Weir's testimony that the administrative assistant was the person he relied upon to contact local officials in a given district to coordinate projects and to communicate problems; and that Brayshaw viewed the job as the "top political position" in the district, as well as the "pipeline" between the central office and local officials.

In the Court's view, defendants neglect the fact that, according to Brayshaw, the overwhelming component of an

administrative assistant's duties occurs at the district level. The administrative assistant meets on a regular basis with the high level staff members of the district, not the central office. In fact, Brayshaw estimated that an administrative assistant would spend one percent of his time meeting with the Director of ODOT. This estimate is consistent with Weir's inability to recall any specific contribution either of the two administrative assistants for District 8 had made during the time in question.

The Court upon review of the job description and the relevant testimony finds that the inherent duties of the administrative assistant position do not demonstrate that political affiliation or support is an appropriate requirement for the effective performance of that office. The duties appear to be administrative in nature and do not comprise any policymaking function or fiduciary relationship with the Director. Even Weir acknowledged that appointment to the position did not have to be political.

Defendants also argue that the actual duties to be performed by the administrative assistant, as envisioned by Weir, support a finding that the position falls within the confidential, policymaking exception. Weir testified that he viewed the position as part of his "cabinet" to advise him on

policy matters and problems. But he disregards the fact that the administrative assistant for District 8 was under the direct supervision of the district deputy director, not the Director of ODOT. In fact, as plaintiff points out, nowhere in the job description is the Director even mentioned. Moreover, Weir never took any steps to amend that job description in order to realize the confidential relationship he allegedly sought between himself and the administrative assistants for the various districts.

Therefore, the Court is left, in support of defendants' arguments, only with the self-serving statements of Weir that he regarded the administrative assistant position as one requiring personal and political loyalty. Given Weir's earlier sworn statement on April 11, 1984, that he based his "decisions on hiring, firing and promotions upon job qualification, references and criteria which was not . . . in any way related to an applicant's . . . political activity or loyability [sic]. . . ," his present testimony on this issue is simply not credible.

The Court concludes that party affiliation or support is not an appropriate requirement for the effective performance of the position of administrative assistant for District 8 of ODOT. Faughender is of no help to defendants on this

question. In Faughender, the position at issue was secretary to the mayor. The Sixth Circuit concluded that this position was inherently political not only because it involved access to confidential and political materials, but also because the new mayor envisioned her secretary as a close confidante whom she could count on to give advice. 927 F.2d at 914. Political loyalty, thus, was an essential attribute of the job. Id. Unlike the office of mayor, the Director of ODOT is not an elected official but an appointee of the Governor. Furthermore, the record is devoid of any evidence that the administrative assistant was, or was intended to be, a close confidante of the Director.

Based on the foregoing, the Court concludes that plaintiff has met his burden under both parts of the Faughender test. Accordingly, defendants' motion for judgment as a matter of law is **DENIED**, and the Court shall address the merits of plaintiff's claim.

II.

Before proceeding to the merits of plaintiff's claim, it is necessary to rule on the admission of plaintiff's exhibits 5, 6, 7, 8, 9, 10, and 30 for which the Court previously reserved ruling. Exhibits five through ten were identified as follows:

5. position description for Executive 4, special assistant to the administrative assistant for District 8.

6. memo from Charles Witte to all employees dated June 21, 1976 regarding plaintiff in charge of District 8 on June 28, 1976.

7. memo from Charles Witte to R.E. Gallagher dated April 14, 1975 authorizing plaintiff to sign documents on behalf of the district deputy director.

8. memo from William Brayshaw to R.E. Gallagher dated January 3, 1977 authorizing plaintiff to sign documents on behalf of the district deputy director.

9. memo from McKee Cornell to R.E. Gallagher dated March 4, 1977 authorizing plaintiff to sign documents on behalf of the district deputy director.

10. memo from McKee Cornett to staff members dated March 4, 1977 regarding plaintiff's signing documents in Cornett's absence.

Defendants object to the admission of these exhibits on grounds of relevancy.

The Court finds that each of these exhibits is material to the issue of whether plaintiff was qualified for the position of administrative assistant for District 8. The testimony established that plaintiff held the Executive 4 position described in Exhibit 5 for three months in 1975. The descrip-

tion specified that the holder of that office would act as administrative assistant in the latter's absence. Exhibits six through ten show that plaintiff indeed acted in such a capacity on several occasions performing the duties of administrative assistant for District 8 on a temporary basis. Therefore, Exhibits 5, 6, 7, 8, 9, and 10 are relevant and shall be admitted for the purpose of establishing plaintiff's qualifications for the position in question.

Plaintiff's Exhibit 30 is the deposition, together with exhibits, of Wendell Strong taken in the case of John Podsobinski vs. James A. Rhodes, et al., case no. C-2-81-653 (S.D. Ohio E.D.). Mr. Strong is deceased. Defendants originally objected to this exhibit on hearsay grounds contending that although they were parties in that case, they did not have a similar motive in cross-examining Strong because the issues in that case related to hiring, and not promotion. Plaintiff later limited his request for admission of this deposition only as to the testimony dealing with ODOT's hiring procedures. Defendants nonetheless continued to maintain their objection arguing that any testimony concerning ODOT's hiring procedures was not relevant to the issue of whether plaintiff was unlawfully denied a promotion.

The Court finds that defendants did have an opportunity and a similar motive to develop Strong's testimony by cross-examination as to the issue of unlawful hiring procedures. Therefore, Strong's deposition is admissible as former testimony under Fed. R. Evid. 804(a)(1). The Court also finds that despite its limited relevancy to the issues in this case the testimony should not be excluded. The Court previously allowed testimony on the issue of ODOT's hiring procedures, and there is no reason to treat Strong's testimony any differently. Accordingly, plaintiff's Exhibit 30 is admitted for the limited purpose of tending to establish ODOT's discriminatory hiring practices.

The Court will now proceed to the merits of plaintiff's claim.

Plaintiff, a Republican, never contributed any money to the Republican Party throughout his tenure at ODOT. A plaintiff such as Rice may state a claim for political discrimination even though he is a member of the same political party as the defendant officeholders. See Williams v. City of River Rouge, 909 F.2d 151, 153-54 n.4 (6th Cir. 1990) (reasoning of Supreme Court in Branti has been understood to

apply to political differences of any kind, not merely differences in party membership). Thus, if plaintiff can establish that he failed to obtain the position of administrative assistant for District 8 because he did not contribute money to or otherwise actively support the Republican Party, he would state a valid First Amendment claim under Rutan, 110 S. Ct. 2729, 2737.

The Court also finds that plaintiff was qualified for the position of administrative assistant. This finding is supported by Brayshaw's testimony that plaintiff was performing the duties of administrative assistant while Cornett was on leave and continued to perform those duties even after his temporary work level was disapproved. Brayshaw testified that in his view plaintiff was the best qualified person to perform those duties during Cornett's absence. Exhibits 6 through 10 further attest to the fact that plaintiff was on several occasions either left in charge of District 8 or authorized to sign documents in the absence of his immediate supervisors.

Plaintiff produced very little direct evidence, however, that he was discriminated against due to his lack of financial contribution to the Republican Party. In this regard plaintiff offered a statement by McCray when he approached

McCray following Fife's appointment to ask why he was not promoted. McCray allegedly told plaintiff that Fife had the support of the majority of the Republican county chairmen and that for a position such as administrative assistant "you have to be a good contributor and I am saying a good contributor, a large amount, for that position, for the position of administrative assistant, and be a very active member of the Republican Party." Plaintiff also points to a document captioned "recruitment procedures" which was identified as Exhibit 1 in the Strong deposition. The document provides, inter alia, that "[i]n every instance the District will attempt to hire (when a choice exists) a Republican who has worked and contributed in preference to a 'single vote."

The Court does not believe that either of these pieces of evidence by itself or in conjunction with the rest of the evidence establishes that plaintiff's refusal to contribute to the Republican Party played a substantial or motivating role in defendants' decision not to promote him to administrative assistant. McCray did not testify at trial or by deposition. The evidence suggested, however, that McCray acted as a conduit between Weir and the Republican county chairmen. Thus, if he made the statement attributed to him, it may have merely reflected his understanding that the chairmen

would not endorse anyone for administrative assistant who was not an active member of the Republican Party and a good contributor. Whether this understanding was correct cannot be known from the record. The only Republican county chairman to testify was Oscar Egleston and he did not attend either of the meetings in which Siehl and Fife were endorsed. In both instances, Weir followed the recommendations of the chairmen and appointed the endorsed candidate. In doing so, he denied ever asking whether an applicant was active in Republican affairs or contributed money to the party, and his testimony on this point was unrebutted. Furthermore, plaintiff conceded that neither Weir or McCray ever told him he was denied the promotion because of a perceived lack of support of the Republican Party.

The circumstances surrounding the appointments of Siehl and Fife likewise do not lead to the conclusion that plaintiff was discriminated against because he failed to support the Republican Party. There is nothing in the record to suggest that either Siehl or Fife contributed money to the Republican Party or that either was more active than plaintiff in party affairs prior to their appointments. The evidence did establish that Siehl took a leave of absence to work on

the Republican gubernatorial campaign, but this occurred after his appointment. Similarly, there is evidence that Fife solicited contributions to the Republican Party following (but not before) his temporary appointment. What the evidence does suggest is that both Siehl and Fife benefitted from the positions of their fathers in the Republican Party, and, for this reason, may have been better able than plaintiff to secure the endorsement of the majority of the Republican County chairmen. Therefore, it is far from clear that plaintiff could have placed himself in a more favorable position simply by contributing money and becoming more active in the Republican Party.

CONCLUSION

Based on the foregoing, the Court concludes that plaintiff has failed to prove by a preponderance of the evidence that his lack of support for the Republican Party was a substantial or motivating factor in defendants' refusal to promote him to the position of administrative assistant. Accordingly, the Clerk shall enter final judgment in favor of defendants Ohio Department of Transportation, David L. Weir, Patrick McCray and Jerry Wray.

IT IS SO ORDERED.

(signed) _____
John D. Holschuh, Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD RICE,	:	
Plaintiff,	:	Case No. C-2-82-1700
vs.	:	JUDGE HOLSCHUH
OHIO DEPARTMENT OF TRANSPORTATION, ET AL.,	:	
Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

I, David Weir, being duly sworn according to law, on oath, make affidavit and say:

1. That I served in the capacity of and, at all times relevant to this action, was the Director of the Ohio Department of Transportation (ODOT).
2. That I am not aware of any policy and/or practice in the ODOT which would permit and/or authorize the practice of political and/or age discrimination in the employment of persons in the ODOT District 8.
3. That I am unaware of any discriminatory acts committed against the Plaintiff.

4. That I do not have knowledge of alleged discrimination based upon political loyalty and/or age which Plaintiff alleges occurred in the appointments, both temporary and permanent of employees to fill the position of Administrative Assistant at ODOT District 8 in September, 1981 or September, 1982.

5. That I have not been knowingly or unknowingly responsible for alleged discrimination against the Plaintiff.

6. That I have not knowingly or unknowingly discriminated against the Plaintiff in retaliation for his previously filing a charge of discrimination with a governmental agency against the ODOT.

7. That I have not acted individually or collectively with others under color of state law in my official capacity or otherwise to deprive Plaintiff of any state or federal rights.

8. That I have not acted in conspiracy to deprive Plaintiff of any rights.

9. That I did not refuse to promote the Plaintiff on the basis of political activity or loyalty or lack of same.

10. That I based my decision on hiring, firing and promo-

tions upon job qualification, references and criteria which was not based on or in any way related to an applicant's age, political activity or loyabilty [sic] or in "retaliation" for Plaintiff's filing a previous charge of discrimination against the Ohio Department of Transportation.

(signed)_____
David L. Weir

Sworn to and subscribed before me on this 11th day of April 1984.

(signed)_____
Notary Public

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

EDWARD RICE,	:	
Plaintiff,	:	Case No. C-2-82-1700
vs.	:	JUDGE HOLSCHUH
OHIO DEPARTMENT OF TRANSPORTATION, ET AL.,	:	
Defendants.	:	

AFFIDAVIT IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

I, Patrick McCray, being duly sworn according to law, on oath, make affidavit and say:

1. That I served in the capacity of Deputy Director for Administrative Affairs, Ohio Department of Transportation (ODOT), during all times relevant to this action.

2. That as Deputy Director of Administrative Affairs, I did oversee and work together with the Bureau of Personnel at ODOT.

3. That I am not aware of any policy and/or practice in ODOT which would permit and/or authorize the practice of political and/or age discrimination in the employment of persons in ODOT, District 8.

4. That I did not refuse to promote the Plaintiff on either

a temporary or permanent basis on the basis of his political activity and/or in retaliation for his filing a previous discrimination charge against ODOT and/or on the basis of his age. Further, Defendant Weir, Director of ODOT, is the only party who is authorized to hire or promote employees for ODOT.

5. That I never individually or in connection with any other person, authorized any policy and/or practice in the ODOT which would permit and/or authorize the practice of political and/or age discrimination in the employment of persons in ODOT, District 8.

6. That I am not aware of any discriminatory acts committed against the Plaintiff.

7. That I have no knowledge of the alleged discrimination based on political activity or loyalty and/or age which is alleged to have occurred in the employment of persons in ODOT, District 8.

8. That I have not knowingly or unknowingly discriminated against the Plaintiff in retaliation for his previously filing a charge of discrimination with a governmental agency against ODOT.

9. That I have not been knowingly or unknowingly responsible for the alleged discrimination against the Plaintiff.

10. That I have not acted individually or collectively with others under color of state law in my official capacity

or otherwise, to deprive Plaintiff of any federal or state rights.

11. That I have not acted in conspiracy to deprive Plaintiff of any rights.

12. That any input, consultation or references which I made regarding employment decisions were based upon job qualifications, the best interests of ODOT and criteria not in any way based upon or related to an applicant's age, political loyalty or activity or in "retaliation" for filing previous charges of discrimination.

(signed)_____
Patrick McCray

Sworn to and subscribed before me on this 11th day of April 1984.

(signed)_____
Notary Public